

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly and Marc Spitzer.

Southwest Power Pool, Inc.

Docket Nos. ER05-1416-001
EL06-83-000

ORDER GRANTING REHEARING, INSTITUTING SECTION 206 PROCEEDING,
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 28, 2006)

1. In this order, we will grant Southwest Power Pool, Inc.'s (SPP) request for rehearing of the Commission's order issued on October 27, 2005,¹ to provide it a forum in which to address its assertion that its projected native load needs, among other reasons, justify a restriction on the rollover rights of its transmission customer, Southwestern Public Service Company (Southwestern) d/b/a Xcel Energy Marketing (Xcel), and institute a proceeding pursuant to section 206 of the Federal Power Act (FPA)² in Docket No. EL06-83-000, in order to provide SPP that forum.

Background

2. On August 31, 2005, SPP filed a proposed executed service agreement for 35 MW of long-term, firm, point-to-point transmission service agreement (Agreement) with Southwestern. The Agreement has a term of one year and five months, and would terminate on January 1, 2007. As originally filed, section 2.0 of the specifications for the Agreement proposes to limit Southwestern's exercise of rollover rights after November 30, 2007, because SPP's analysis indicated that, beginning December 1, 2007, insufficient voltage support and thermal capacity existed to accommodate the future rollover of the Agreement. Section 2.0 went on to explain that this limitation is due to "the forecasted increase in native and network load and due to currently committed network and point-to-point reservation flowing during and either extending beyond the period of this request or having no rollover limitations." In the October 2005 Order, the Commission found that SPP failed to show evidence of specific and supported native and network load growth or pre-existing contract obligations that commence in the future that

¹ *Southwest Power Pool, Inc.*, 113 FERC ¶ 61,101 (2005) (October 2005 Order).

² 16 U.S.C. § 824(e) (2000).

would limit its ability to provide rollover rights to Southwestern.³ Accordingly, the October 2005 Order accepted the Agreement for filing, with certain modifications, and directed SPP to make a compliance filing removing limitations on Southwestern's rollover rights. SPP made that compliance filing on November 28, 2005 in Docket No. ER05-1416-002.

Rehearing Request

3. In its request for rehearing, SPP raises the following issues: (1) whether the Commission properly rejected the uncontested rollover provision without holding a hearing or technical conference or requesting additional information; and (2) whether the Commission engaged in reasoned decision-making, arguing, among other things, that the October 2005 Order will have a potentially adverse effect on reliability and possibly lead to fewer firm transmission requests being approved, and that the proposed limitation on rollover rights was based on highly technical studies using SPP's system models. SPP also requests that the Commission clarify what type of support it finds to be sufficient to support a limitation on rollover rights.

Notice of Filing and Responsive Pleadings

4. Notice of the November 28, 2005 compliance filings was published in the *Federal Register*, 70 Fed Reg. 73,468 (2005). In response to the request for rehearing, Xcel, Edison Electric Institute (EEI), and Oklahoma Corporation Commission (Oklahoma Commission) all filed motions to intervene out of time, with EEI and the Oklahoma Commission including an answer in support of clarification. On December 9, 2005, Xcel filed its motion to intervene out of time. EEI filed its motion to intervene out of time and answer in support of request for clarification on December 13, 2005. Finally, Oklahoma Corporation filed its motion to intervene and answer out of time on March 14, 2006.

Discussion

Procedural Matters

5. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and the burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.⁴ In this instance, the movants have not demonstrated such good cause, and thus, their respective motions to intervene out of time are denied.

³See October 2005 Order at P 13.

⁴See California Independent System Operator Corporation, 114 FERC ¶ 61,339 at P 19 (2006).

Hearing and Settlement Judge Procedures

6. Upon further consideration and as discussed below, we will grant rehearing to provide SPP a forum in which to address its assertion that its ability to provide Southwestern rollover rights beyond November 30, 2007, is restricted due to its “forecasted increase in native and network load and due to current committed network and point-to-point reservations flowing during and either extending beyond the period of this request or having no rollover limitations.”⁵ The issues to be addressed include whether SPP can demonstrate that the forecasted increases suggested in section 2.0 of the Agreement prevent it from providing rollover service to Southwestern over the specific transmission capacity (*i.e.*, contract path) used by Southwestern.

6. Because the Commission accepted SPP’s filing in the October 2005 Order without suspension or hearing, subject to the modification that the rollover restriction be removed, we will institute a section 206 proceeding in Docket No. EL06-83-000, with a refund effective date, to provide SPP the forum discussed above.⁶ In addition, because this investigation will involve issues of material fact, we will set the matter for a trial-type evidentiary hearing.

7. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b), as amended by the Energy Policy Act of 2005,⁷ requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of the initiation of the Commission’s proceeding in the *Federal Register*, and no later than five months after the publication date. In order to give maximum protection to customers, and consistent with our precedent,⁸ we will establish a refund effective date at the earliest date allowed. This date will be the date on which notice of the initiation of the proceeding in Docket No. EL06-83-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by the conclusion of the 180-day period commencing upon initiation of a

⁵ Section 2.0 of the originally proposed Agreement.

⁶ In light of the fact that we are granting rehearing in Docket No. ER05-1416-001 and instituting an investigation and evidentiary hearing concerning Southern’s rollover restrictions in Docket No. EL06-83-000, we will defer action on the compliance filing in Docket No. ER05-1416-002 pending the outcome of this investigation.

⁷ Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

⁸ See, *e.g.*, *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh’g denied*, 47 FERC ¶ 61,275 (1989).

proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Given the nature and complexity of the matters to be resolved, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision by January 31, 2007. If the presiding judge is able to render a decision by that date, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions or by July 31, 2007.

8. While we are setting these matters for investigation and a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) SPP's rehearing request is hereby granted as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL06-83-000, as discussed in the body of this order. However, the investigation and hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

⁹ 18 C.F.R. § 385.603 (2006).

¹⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the date of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The Secretary shall promptly publish a notice of the Commission's initiation of the investigation under section 206 of the FPA in Docket No. EL06-83-000 in the *Federal Register*.

(G) The refund effective date in Docket No. EL06-83-000, established pursuant to section 206(b) of the FPA, will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.